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Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,
AND BRITTANI HENRY, *et al.*,

Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* CAMPAIGN FOR SOUTHERN EQUALITY AND EQUALITY FEDERATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE*

The Campaign for Southern Equality is a civil rights organization based in North Carolina that advocates across the South for the full equality, dignity, and humanity of lesbian, gay, bisexual, and transgender people.

Equality Federation is the national strategic partner to a network of more than 40 organizations working for the equality of lesbian, gay, bisexual, and transgender people at the state level across the country.

SUMMARY OF ARGUMENT

Laws have a teaching effect in American communities. The laws surveyed in this brief, which are the product of a political process that targets gay people[1] as a vulnerable minority, teach that gay people are to be condemned, and that they, and their children, are undeserving of basic freedoms and protections. These lessons ripple across the social fabric of our nation, forcing gay Americans and their families to navigate the daily harms and stigma inflicted by state laws that deny them dignity and the right to participate in civic life through the institution of marriage.

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* No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The respondents have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs. The petitioners' consents are submitted herewith.

1. The term "gay" as used herein refers to lesbians, gay men, and people in same-sex relationships.

The central ground for the Sixth Circuit's decision to uphold the challenged same-sex marriage bans is its assertion that federal courts should deferentially allow each state to decide whether there should be any such marital right within its territory. *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014) ("And all come down to the same question: Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic process?").

But this Court's jurisprudence dictates a "more searching judicial inquiry" when the "political processes ordinarily to be relied upon to protect minorities" have been "curtail[ed]." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The four-factor framework of *Carolene Products* has been adopted by this Court in determining when a law disadvantages a "suspect class," the trigger for heightened scrutiny.[2]

This brief addresses the fourth factor of *Carolene Products* – whether the minority group has been "relegated to a . . . position of political powerlessness" – and demonstrates that the Sixth Circuit's conclusion in *DeBoer* is based on a false premise. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 433 (1985) ("a

2. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The four factors are (1) whether the class has suffered a history of discrimination; (2) whether the subject's trait bears any relation to his or her ability to contribute to society; (3) whether the discrimination is based on "obvious, immutable, or distinguishing characteristics that define them as a discrete group," and (4) whether the group is politically powerless. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

continuing antipathy or prejudice" requires a "need for more intrusive oversight by the judiciary"). Even where a class comprises half the population in raw numbers and has achieved substantial political success, heightened scrutiny is appropriate where the class discrimination persists as a result of the political process. *See Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973). Gay Americans, who comprise only an estimated 3.5% of the nation's population,[3] do not possess the political power to protect their constitutional rights through the democratic process as suggested by the Sixth Circuit's decision.

In the context of the lives of the politically powerless – including gay Americans – this Court has a proud tradition of exercising its Constitutional authority when a controlling majority "identifies persons by a single trait and then denies them the possibility of protection across the board." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Indeed, in the past, when political majorities disregarded the constitutional rights of political minorities, this Court has intervened to protect them. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483, 487-88 (1954). This judicial role is consistent with the goals of the Framers and this Court, who never countenanced yielding the adjudication of constitutional rights to "the superior force of an interested and overbearing majority." *The Federalist* No. 10. (James Madison).

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3. Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender* (The Williams Institute, April 2011), *available at* http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-transgender/.

The laws at issue in these cases impose a "broad and undifferentiated disability" solely on gay Americans. *Romer*, 517 U.S. at 632. In the face of such discriminatory laws, it is the federal judiciary's role to uphold the promise of equality. As the federal trial court in Mississippi recently noted in this very context, "[T]he courts do not wait out the political process when constitutional rights are being violated, especially when the political process caused the constitutional violations in the first place."[4]

To be sure, a majority of Americans now support marriage equality.[5] An estimated 65% of Americans report having a family member or close friend who is openly gay, and with this familiarity comes personal support and acceptance.[6] But in many states, there has been strong, even fierce, political resistance to this emerging acceptance, with the purposeful erection of state constitutional barriers to marriage and legislation in other areas to thwart the equal opportunities of gay Americans.

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4. *Campaign for Southern Equality v. Bryant*, 2014 WL 6680570 at *33 (S.D. Miss. Nov. 25, 2014).

5. According to a recent Public Religion Research Institute poll, 54% of Americans favor or strongly favor marriage equality. Robert P. Jones, Public Religion Research Institute, Attitudes on Same-Sex Marriage by State (Feb. 10, 2015). A May 21, 2014 Gallup poll shows 55% support for marriage equality nationwide. Justin McCarthy, Same-Sex Marriage Support, May 21, 2014, *available at* http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx. A 2013 poll shows 53% support. Alex Lundry, TargetPoint Consulting, ENDA National Poll Results (Sept. 16, 2013).

6. Public Religion Research Institute, Survey (Feb. 26, 2014), http://publicreligion.org/research/2014/02/2014-lgbt-survey/.

The assertion of political power has been most pronounced in states where significant numbers of gay Americans – and their children – live. One in three gay Americans live in the South.[7] The percentage of same-sex couples raising children is highest in the Southern states:[8] Arkansas (30%),[9] Mississippi (29%),[10] Louisiana (27%),[11] and Kentucky (23%).[12]

As the factual examples in this brief make clear, political opposition to the rights of gay Americans stubbornly remains. Accordingly, a decision by this Court that splits the resolution of the two questions presented in the cases under review will create chaos and uncertainty and will cause further entrenchment of political opposition to the rights of gay Americans. Waiting an indeterminable period for political will to match the private courage and dignity of gay Americans, as the Sixth Circuit posits in *DeBoer*, is not a solution to a constitutional problem.

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7. Gary J. Gates, et al., *The LGBT Divide: A Data Portrait of LGBT People in Midwestern, Mountain & Southern States* (The Williams Institute, Dec. 2014), http://williamsinstitute.law.ucla.edu/lgbtdivide/#/ethnicity.

8. The national average is 19%. Gary J. Gates, *LGB Families and Relationships: Analyses of the 2013 National Health Interview Survey* (The Williams Institute, Oct. 2014).

9. Gary J. Gates, *Same-Sex Couples in Arkansas: A Demographic Summary* (The Williams Institute, Oct. 2014).

10. Gary J. Gates, *Same-Sex Couples in Mississippi: A Demographic Summary* (The Williams Institute, Dec. 2014).

11. Gary J. Gates, *Same-Sex Couples in Louisiana: A Demographic Summary* (The Williams Institute, Oct. 2014).

12. Gary J. Gates, *Same-Sex Couples in Kentucky: A Demographic Summary* (The Williams Institute, June 2014).

ARGUMENT

I. DESPITE GROWING PUBLIC SUPPORT, GAY AMERICANS ARE A MINORITY WHOSE POLITICAL POWERLESSNESS WARRANTS HEIGHTENED SCRUTINY

The recent increase in the number of states that recognize marriage equality due to federal court decisions, coupled with the political reality that gay Americans have been unable to protect their rights in state legislatures, demonstrates that the only recourse for Constitutional violations is through the courts.

In the South in particular, the legacy of interracial marriage bans and state-sanctioned segregation hangs over the constitutional question of marriage equality. When *Loving v. Virginia* was decided, the sixteen states with anti-miscegenation statutes were entirely in the Southeast region.[13] The year after *Loving*, a Gallup poll revealed that 73% of Americans opposed interracial marriage.[14]

At oral argument in the marriage equality case filed in Mississippi, U.S. District Court Judge Reeves, the second African-American appointed to the federal bench in the

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13. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (citing Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia).

14. Joseph Carroll, Most Americans Approve of Interracial Marriages, Gallup Poll (June 2007), *available at* http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx.

State's history, queried the Assistant Attorney General: "I'll pose the wait-and-see question to you about the all deliberate speed. So if we do that – it was 1954 that *Brown* was enacted and in Mississippi it was 1970 before my first-grade class was integrated.. . . [D]oesn't the court have some responsibility to maybe not wait and see?"[15]

Judge Reeves cited "the uncomfortable reality" that anti-miscegenation statutes remained on the books in the South through the 21st century. He noted a poll revealed that nearly half of Mississippi's majority political party still thought interracial marriage should be illegal – *in 2011*.[16] Judge Reeves then answered the question he posed at oral argument:

> If the passage of 50 years has had such negligible impact on the public's opinion of interracial marriage in the Deep South, it is difficult to see how gay and lesbian Mississippians can depend on the political process to provide them any timely relief. And while they wait and see how the political process will play out, their legal rights and those of their children will continue to be denied. As Justice Kennedy said in another same-sex marriage case, "[t]he voice of those children is important in this case, don't you think?"[17]

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15. Transcript of Oral Argument on Motion for Preliminary Injunction and Contingent Motion for Stay Pending Appeal at 90, *Campaign for Southern Equality v. Bryant*, No. 3:14-cv-818, Docket No. 29 (S.D. Miss. Nov. 12, 2014).

16. *Campaign for Southern Equality v. Bryant*, 2014 WL 6680570, at *33.

17. *Id.* at *34.

Indeed, the State of Mississippi provides an illustrative example of the political powerlessness of gay citizens. Mississippi's marriage ban passed in 2004 by the greatest margin found in any other state. As noted herein, Mississippi is also home to a significant number of children being raised by same-sex couples.[18]

To "wait and see how the political process will play out" is no remedy to the constitutional violation of denying "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. In conjunction with the wave of federal court decisions that affirm marriage equality, popular support has grown. However, a canvass of legislation introduced in the areas of employment, adoption, education, and hate crimes shows that gay Americans remain politically powerless to protect their rights.

A. Marriage

The history of marriage itself demonstrates the necessity of judicial intervention. In 1996, the Hawaiian Supreme Court became the first court in the nation to declare a statute restricting marriage to opposite-sex couples unconstitutional.[19] A political response ensued, including passage of the federal Defense of Marriage Act, a section of which was declared unconstitutional by this Court in *United States v. Windsor*, 133 S.Ct. 2675

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18. Gary J. Gates, *Same-Sex Couples in Mississippi: A Demographic Summary* (The Williams Institute, Dec. 2014).

19. *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996).

(2013).[20] Hawaii and Alaska then became the first states to enact constitutional amendments banning recognition of marriage between same-sex couples.[21]

In the ten-year period that followed between 1998 and 2008, 30 states enacted constitutional amendments banning recognition of marriage between same-sex couples.[22] Thirteen amendments were enacted in the months after Massachusetts became the first state to issue marriage licenses to same-sex couples in 2004.[23] North Carolina is the latest state to enact an amendment banning recognition of marriage equality, having passed its ban on May 8, 2012, following the election of a new political majority.[24]

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20. Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 Wm. & Mary Bill Rts. J. 1493 (2006).

21. Human Rights Campaign, History of State Constitutional Marriage Bans, http://www.hrc.org/resources/entry/state-constitutional-marriage-bans#_ftn1.

22. Human Rights Campaign, History of State Constitutional Marriage Bans, http://www.hrc.org/resources/entry/state-constitutional-marriage-bans#_ftn1.

23. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); Ari Shapiro, As Gay Marriage Heads to Court, A Look Back At The Bumpy Ride, National Public Radio (Mar. 21, 2003), *available at* http://www.npr.org/2013/03/21/174879832/as-gay-marriage-heads-to-court-a-look-back-at-the-bumpy-ride.

24. National Conference for State Legislatures, Same-Sex Marriage and Domestic Partnerships on the Ballot (Nov. 7, 2012), *available at* http://www.ncsl.org/research/elections-and-campaigns/same-sex-marriage-on-the-ballot.aspx.

Since *United States v. Windsor*, many of these amendments have been declared unconstitutional by the courts, and a total of 38 states now recognize marriage equality.[25] Of those, 26 were by federal court decisions.[26] More than 70% of Americans now live in a state in which same-sex couples may freely marry.[27]

Those rulings have catalyzed a surge of national popular support for marriage equality.[28] Americans now believe by a 2-to-1 margin that the issue of marriage equality should be decided as a constitutional matter.[29]

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25. Nebraska became the 38th state to recognize marriage equality on March 3, 2015. Reid Wilson, Federal Judge Blocks Nebraska Marriage Ban, The Washington Post (Mar. 2, 2015), *available at* http://www.washingtonpost.com/blogs/govbeat/wp/2015/03/02/federal-judge-blocks-nebraska-gay-marriage-ban/.

26. National Conference of State Legislatures, Same-Sex Marriage Laws (Feb. 9, 2015), *available at* http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx.

27. Richard Wolf, Supreme Court Agrees to Rule on Gay Marriage, USA Today (Jan. 16, 2015), *available at* http://www.usatoday.com/story/news/nation/2015/01/16/supreme-court-gay-marriage/21867355/.

28. According to a recent Public Religion Research Institute poll, 54% of Americans favor or strongly favor marriage equality. Robert P. Jones, Public Religion Research Institute, Attitudes on Same-Sex Marriage by State (Feb. 10, 2015). A May 21, 2014 Gallup poll shows 55% support for marriage equality nationwide. Justin McCarthy, Same-Sex Marriage Support, May 21, 2014, *available at* http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx. A 2013 poll shows 53%. Alex Lundry, TargetPoint Consulting, ENDA National Poll Results (Sept. 16, 2013).

29. Jon Cohen, *Gay Marriage Support Hits New High in Post-ABC Poll*, The Washington Post, Mar. 18, 2013, *available at* http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/18/gay-marriage-support-hits-new-high-in-post-abc-poll/.

Despite this change in public sentiment, support for marriage equality has yet to manifest itself as an effective nationwide political force.

The cases under review demonstrate two patterns of political powerlessness in the area of marriage equality. The first, represented by Michigan and Ohio, illustrates a resistance by state legislatures to respond to growing public support for marriage equality. The second, represented by Kentucky and Tennessee, demonstrate that the low level of public support is likely to entrench political opposition by the majority to marriage equality for the foreseeable future.

1. Michigan and Ohio: Legislative Inaction On Marriage Equality Despite Public Support.

In 2004, 58.6% of Michigan residents voted to ban recognition of marriages between people of the same sex, and only 30% of those polled in the same year supported marriage equality.[30] When the first bill to repeal the marriage ban was introduced in 2009, public support was close to 50%.[31] That bill never made it to committee.[32] A second and similar bill introduced in 2013 was also

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30. Andrews R. Flores and Scott Barclay, *Public Support for Marriage for Same-Sex Couples by State*, The Williams Institute (April 2013).

31. Andy Henion and Charles Ballard, *Support for Gay Marriage in Michigan Remains Strong*, Michigan State University (Feb. 28, 2014).

32. Todd Heywood, Proposed Same-Sex Marriage Bill Surprises Michigan Dems, Reproductive & Sexual Health Justice (June 16, 2009), *available at* rhrealitycheck.org/article/2009/06/16/proposed-samesex-marriage-bill-surprises-michigan-dems/.

defeated in committee, even though public support for marriage equality had grown.[33] Fifty-five percent of Michigan residents polled in 2015 support marriage equality.[34]

Today, an estimated 53% of Ohioans support marriage equality,[35] whereas 61.7% voted to enact the state's marriage ban in 2004. Notwithstanding this change in public opinion, only one resolution has been introduced in Ohio to repeal the state's constitutional amendment. That lone resolution died without being referred to committee for consideration.[36]

In other states, marriage equality has been achieved through rulings from Article III judges, and not from legislative action, despite majority or near-majority public support: Wisconsin (59% support), New Mexico (58%), Pennsylvania (56%), Nebraska (54%), Idaho (53%), and near-majorities in Virginia (50%), Kansas (50%), North Dakota (50%), Texas (48%), Oklahoma (47%), Montana (47%), and Indiana (47%).[37]

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33. Senate Bills 405, 406, and Joint Resolution W were referred to the Senate's Government Operations Committee on June 4, 2013. *See* SB 405: https://legiscan.com/MI/votes/SB0405/2013; SB 406: https://legiscan.com/MI/text/SB0406/id/859934; Joint Resolution W: https://legiscan.com/MI/text/SJRW/id/85999.

34. Robert P. Jones, Public Religion Research Institute, *Attitudes on Same-Sex Marriage by State* (Feb. 10, 2015).

35. *Id.*

36. OH House Joint Resolution 7 was introduced in 2009. https://legiscan.com/OH/text/HJR7/id/501444.

37. Public Religion Research Institute, State of the States on Same-Sex Marriage (Feb. 11, 2015), *available at* http://publicreligion.org/2015/02/state-of-the-states-on-gay-marriage/.

2. Kentucky and Tennessee: Legislative Inaction Because Of Public Opposition to Marriage Equality.

Kentucky and Tennessee are emblematic of parts of the country where public support for marriage equality is unlikely to reach a majority for the foreseeable future. Kentucky's constitutional amendment passed with 75% of the vote in 2004.[38] By 2015, Kentuckians' support for marriage equality is only 40%.[39] In Tennessee, a constitutional amendment banning marriage equality passed in 2006 with 81% of the vote.[40] Today, public support in Tennessee hovers at 39%.[41] Neither political power nor public opinion provide balm or aid for gay citizens in these states.

The political powerlessness of gay citizens with respect to marriage equality is also manifest in their inability to secure protections in employment, adoption law, education and the criminal codes.

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38. Kentucky State Board of Elections, Report of "Official" Election Night Tally Results (Nov. 24, 2004), *available at* http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/2000-2009/2004/General%20Election/2004statebyoffice.txt.

39. Public Religion Research Institute, State of the States on Same-Sex Marriage (Feb. 11, 2015), *available at* http://publicreligion.org/2015/02/state-of-the-states-on-gay-marriage/.

40. Tenn. Constitutional Amendment Question (Nov. 7, 2006).

41. Public Religion Research Institute, State of the States on Same-Sex Marriage (Feb. 11, 2015), *available at* http://publicreligion.org/2015/02/state-of-the-states-on-gay-marriage/.

B. Employment

A person's sexual orientation has no bearing on his or her ability to make meaningful contributions to his or her profession or community.[42] The absence of employment nondiscrimination protections in the face of public support demonstrates that even when Americans support protections for gay citizens, there is not the political power to enact them. That reality also leads to the conclusion that even if a supermajority of Americans eventually support marriage equality, in many states, particularly those in the South, there is a small likelihood that such popular support would translate to the passage of marriage equality legislation.

The disconnect between public support and legislative achievement is also glaring in Ohio. There, 68% of Ohioans support making it illegal to discriminate in employment or housing based on sexual orientation or gender identity.[43] Yet repeated efforts at passing an inclusive nondiscrimination bill have failed. Most recently, House Bill 335, which would have included sexual orientation and gender identity in anti-discrimination laws in housing,

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42. The U.S. District Court for the Western District of Wisconsin wrote that it was "not aware of any cases in which a court concluded that being gay hinders an individual's ability to contribute to society." *Wolf v. Walker*, 986 F. Supp. 2d 982, 1012 (W.D. Wis. 2014). In fact, at least twelve Article III judges are openly gay. Neil Eggleston, Judicial Nominations: Accomplishments and the World That Lies Ahead, The White House Blog (Dec. 17, 2014), *available at* http://www.whitehouse.gov/blog/2014/12/17/judicial-nominations-accomplishments-and-work-lies-ahead.

43. The Glengariff Group, Inc., Equality Ohio Education Fund 2009 Statewide Survey (Feb. 10, 2009).

employment, and public accommodations, passed a divided Ohio House but failed to make it through the Senate.[44]

Similarly, in Virginia, 75% support a state law to protect gay people from employment discrimination.[45] Yet, bills to accomplish that end have been routinely thwarted in a House subcommittee every legislative session since 2010.[46]

In Mississippi, 66% believe that employment discrimination against people because of their sexual orientation should not be allowed, but no such bill has ever been introduced.[47]

An overwhelming majority – 73% – of North Carolinians support an employment nondiscrimination law.[48] A bill to protect state employees has been introduced

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44. *See* HB 335, http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_335; SB 231, http://archives.legislature.state.oh.us/bills.cfm?ID=129_SB_231. *See also* status report of SB 231, http://lsc.state.oh.us/coderev/sen129.nsf/Senate+Bill+Number/0231?OpenDocument.

45. Greenberg Quinlan Rosner Research, Poll: *New Attitudes in the New Dominion*, July 11, 2013.

46. Equality Virginia, Workplace Discrimination, http://www.equalityvirginia.org/equality-virginia-at-the-general-assembly/ (last visited Feb. 24, 2015); *see also* HB 1498 (Virginia Human Rights Act; prohibits discrimination in public employment), https://leg1.state.va.us/cgi-bin/legp504.exe?151+ful+HB1498.

47. Public Policy Polling, Mississippi Miscellany, Nov. 20, 2013, http://www.publicpolicypolling.com/main/2013/11/mississippi-miscellany.html.

48. Equality North Carolina Poll, http://equalitync.org/latest/news/poll_seventy_three_percent_oppose_workplace_discrimination_directed_at_gay_and_transgender_workers/

repeatedly. Even with 21 co-sponsors in 2014, the bill was sent to committee the day after it was introduced.[49]

In some instances where the political process has worked to provide legal protections for gay people, the absence of political power renders such victories fleeting. On February 10, 2015, Kansas Governor Sam Brownback issued an executive order rescinding an anti-discrimination order protecting gay state employees that was issued in 2007.[50] Governor Brownback's rescission occurred despite 59% of Kansans supporting employment protections for gay people.[51] Governors in Louisiana and Ohio did the same in August 2008 and January 2011, respectively, letting executive orders banning discrimination against state employees expire.[52]

These examples demonstrate that even when there is clear public support for policies that protect gay rights,

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49. Senate Bill 544, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=S544.

50. Sam Levine, Kansas Gov. Sam Brownback Rescinds Anti-Discrimination Protections for LGBT State Workers, HUFFINGTON POST, Feb. 10, 2015, http://www.huffingtonpost.com/2015/02/10/sam-brownback-lgbt-discrimination_n_6656620.html?utm_hp_ref=gay-voices.

51. Alex Lundry, TargetPoint Consulting, ENDA National Poll Results (Sept. 16, 2013).

52. *See* Associated Press, National Briefing, N.Y. Times (Aug. 21, 2008), http://query.nytimes.com/gst/fullpage.html?res=9407EEDB123DF932A1575BC0A96E9C8B63&ref=kathleenbabineauxblanco; Igor Volsky, Ohio Governor John Kasich Allows Employment Protections to Expire, ThinkProgress (Jan. 12, 2011), http://thinkprogress.org/lgbt/2011/01/12/177212/kasich-lgbt-employment/.

gay Americans remain a small and politically disfavored minority. It is the role of the judiciary under these circumstances to protect their constitutional rights.

C. Anti-Gay Adoption

Gay parents can and do raise children. An estimated 131,000 same-sex couples are raising 200,000 biological, step, or adopted children under the age of 18.[53] Same-sex couples are four times more likely than opposite-sex couples to be raising an adopted child and six times more likely to be raising foster children.[54] The evidence is overwhelming that children raised by same-sex parents do as well as children raised by opposite-sex parents, and are no more likely to suffer adverse developmental effects or abuse than children raised by these peers.[55] Yet the majority of children being raised by same-sex couples live in the very states that deny them the stability of having two legally recognized parents.[56] Marriage equality would

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53. Gary J. Gates, *LGB Families and Relationships: Analyses of the 2013 National Health Interview Survey* (The Williams Institute, Oct. 2014).

54. Gary J. Gates, *LGBT Parenting in the United States* (The Williams Institute, Feb. 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

55. *APA on Children Raised by Gay and Lesbian Parents*, American Psychological Association (June 11, 2012), *available at* http://www.apa.org/news/press/response/gay-parents.aspx ("There is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children.").

56. The majority of children being raised by same-sex parents live in the South, Mountain West, and Midwest regions of the country.

permit same-sex couples to adopt the children they are already raising in those states and would provide legal protections to future generations of children.

Although thirty-eight states and the District of Columbia affirmatively allow same-sex couples to adopt a child, the right of same-sex couples to engage in the adoption process is not necessarily the result of the political power of the gay community. While there are some states that permit same-sex couples to adopt as a result of a legislative edict, others were compelled into allowing same-sex couples to adopt as a result of a judicial challenge to state laws barring same-sex couples from the adoption process. *See Ark. Dep't of Human Servs. v. Cole*, 380 S.W. 3d 429, 431 (Ark. 2011) (striking down Arkansas law barring unmarried cohabitants from adopting); *Fla. Dep't of Children & Families v. X.X.G.*, 45 So. 3d 79, 99 (Fla. Ct. App. 2010) (striking down Florida's ban on gay adoption).

In other states, the right of same-sex couples to adopt was recognized as a result of judicial challenges to facially neutral adoption acts that were interpreted by administrators as excluding otherwise qualified same-sex couples. *See, e.g., In re M.M.D.*, 662 A. 2d 837, 859 (D.C. 1995) (holding that unmarried couples living together, whether of the same sex or opposite sex, may adopt under D.C. Code); *In re Adoption of Two Children by H.N.R.*, 666 A. 2d 535, 538 (N.J. App. Div. 1995) (holding state statute allowed an unmarried person, either heterosexual

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Gary J. Gates, *LGBT Parenting in the United States* (The Williams Institute, Feb. 2013), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.

or homosexual, to adopt); *In re E.M.I.*, 57 A. 3d 1278, 1286 (Pa. Super. Ct. 2012) (holding same-sex couples may adopt if they comply with statutory requirement of adoption act); *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 841 n.8 (Cal. 1st Dist. 1991) (holding California adoption statute does not preclude joint adoption by same-sex couples), *reversed on other grounds by Elisa B. v. Superior Ct.*, 37 Cal. 4th 108 (2005); *In re Infant Girl W.*, 845 N.E. 2d 229, 229 (Ind. Ct. App. 2006) (holding Indiana's Adoption Act did not prevent same-sex couple from filing a petition to adopt a child).

As with marriage equality, the ability of same-sex couples to adopt children has succeeded almost entirely because of the judiciary.

D. Education

Gay Americans have not been able to prevent states from inflicting harm on the dignity of gay youth through legislative action. Many states – Alabama, Arizona, Florida, Louisiana, Mississippi, Oklahoma, South Carolina, and Utah – have sex education statutes that ban use of the word "gay," fail to educate students about same-sex sexual behavior, or deny amply proven scientific and public health findings about the realities of life for gay people.[57]

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57. Alabama (Ala. Code § 16-40A-2(c) (2014); Arizona (Ariz. Rev. Stat. Ann. § 15-716 C.1. (2015); Florida (Fla. Stat. § 1003.46(2)(a) (2014) (requiring public schools to "[t]each abstinence from sexual activity outside of marriage" as well as the "benefits of monogamous heterosexual marriage")); Louisiana (La. Rev. Stat. Ann. § 17:281 (2014)); Mississippi (Miss. Code Ann. § 37-13-171(2)(e) (2014)); Oklahoma (Okla. Stat. Tit. 70, § 11-103.3 D.1 (2014)); South

Notwithstanding this Court's ruling in *Lawrence v. Texas*, Alabama children are taught "that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state."[58] A bill to repeal the statute, introduced in 2013 by the state's first openly gay legislator died in committee. Mississippi teachers are required to teach students that "sodomy" is prohibited as a matter of law as part of the state's abstinence-only curriculum.[59] Arizona teachers are prohibited from teaching that homosexuality is a healthy expression of human sexual behavior.[60] Louisiana teachers cannot distribute educational materials that "depict [male or female] homosexual activity."[61]

A South Carolina statute not only prohibits teachers from talking about gay people, but it also restricts the discussion of "homosexual relationships" only "in the context of instruction concerning sexually transmitted diseases."[62] In 2014, a cross-issue coalition of advocacy groups successfully introduced the "Comprehensive Health Education Act," a bill that would have updated curriculum to include comprehensive sex education with medically accurate information. The bill passed the House

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Carolina (S.C. Code Ann. § 59-32-30 A(5) (2014)); Utah (Utah Code Ann. § 53A-13-101(1)(c)(iii)(A)(II) (2014) ("prohibiting instruction in . . . the advocacy of homosexuality")).

58. Ala. Code § 16-40A-2(c)(8) (2014).

59. Miss. Code Ann. § 37-13-171(2)(e) (2014).

60. Ariz. Rev. Stat. Ann. § 15-716 C.1. (2015).

61. La. Rev. Stat. Ann. § 17:281 A(1)(b)(3) (2014).

62. S.C. Code Ann. § 59-32-30 A(5) (2014).

and Senate Education Committee by a 9-2 vote, but a lone legislator blocked the bill from going to a vote on the Senate floor.[63]

These types of corrosive state laws not only harm and stigmatize gay Americans and their families, but ingratiate future generations of American children with ingrain antiquated discriminatory principles. The lack of political power of the gay community to repeal such educational policies therefore ensures future discriminatory animus perpetrated by an unsympathetic majority and further necessitates judicial intervention to protect the gay community from discriminatory legislation.

E. Hate Crimes

All but five states – Arkansas, Georgia, Indiana, South Carolina, and Wyoming – have passed legislation to address "hate crimes," or crimes committed against a person that are motivated by the victim's identity as a member of a discriminated group. Of the 45 states that have passed hate crimes legislation, 15 exclude sexual orientation as a protected class. The exclusion of sexual orientation as a protected group is particularly remarkable considering animus towards gay Americans is the third leading motivation for hate crimes in the United States, and gay Americans are statistically more likely to be attacked for their sexual identity relative to their estimated population size in the United States.[64]

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63. Andrew Coffman Smith, SC Sex Education Bill Blocked in Senate Committee, Greenville Online (May 28, 2014), http://www.greenvilleonline.com/story/news/politics/2014/05/28/sc-sex-education-bill-blocked-senate-committee/9680251/.

64. Michelle A. Mazrullo & Alyn J. Libman, Hate Crimes and Violence Against Lesbian, Gay, Bisexual, and Transgender

That gay Americans have been unable to implement inclusive hate crime legislation in 20 states is evidence that the community lacks the power to protect its members through the legislative process.

II. POLITICAL RESPONSE TO FEDERAL COURT RULINGS AND GROWING PUBLIC SUPPORT FOR MARRIAGE EQUALITY

In the face of a critical mass of federal courts recognizing marriage equality, state-level elected officials are using the power of their offices to express anti-gay animus and to preserve discriminatory laws. Despite the rise of an American public which now more readily accepts gay people as neighbors, friends, family, and colleagues, historical trends and the political dynamics surrounding marriage equality demonstrate that the political process has not adequately addressed the denial of constitutional rights to gay Americans.

Indeed, the introduction of measures intended to undo judicial advances via, for example, statutes that prohibit passage of inclusive ordinances at the local level, mark a political climate in certain regions that emphasize the role of the federal judiciary in protecting the rights of a politically vital unpopular minority. Nowhere is this more evident than in Alabama.

PEOPLE 5 (Human Rights Campaign Foundation 2009), *available at* http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/Hatecrimesandviolenceagainstlgbtpeople_2009.pdf#__utma=149406063.1041058916.1424710999.1424811557.1424814478.5&__utmb=149406063.2.9.1424814478&__utmc=149406063&__utmx=-&__utmz=149406063.1424814478.5.4.utmcsr=google|utmccn=(organic)|utmcmd=organic|utmctr=(not%20provided)&__utmv=-&__utmk=191747498.

A. Alabama

On March 3, 2015, the Alabama Supreme Court – comprised of elected judges – defied a federal court order and halted the issuance of marriage licenses to same-sex couples with a clear invitation to this Court: "we defer only to the holdings of the United States Supreme Court and our own interpretations of federal law."[65]

Pursuant to an order by U.S. District Court Judge Callie V. Granade and this Court's denial of Alabama's application for a stay of the decision, Alabama laws denying same-sex couples were repealed effective February 9, 2015.[66] On the eve before marriages were due to begin, Chief Judge Roy Moore of the Alabama Supreme Court[67] issued a directive instructing local probate judges to ignore the federal court ruling.[68] As a result, on February

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65. *In re: Alan L. King et. al.*, No. 1140460 at *74 (Ala. filed March 3, 2015) (per curiam) (quoting *Glass v. Birmingham So. R.R.*, 905 So.2d 789, 794 (Ala. 2004)).

66. *Searcy v. Strange*, 2015 U.S.Dist. LEXIS 8187 (S.D. Ala. Jan. 23, 2015).

67. Roy Moore ran for Chief Justice on a political agenda to oppose marriage equality, stating it would be the "ultimate destruction of our country." Kim Chandler, Roy Moore Says Gay Marriage Will Be 'Ultimate Destruction of Our Country,'" al.com (Oct. 6, 2012), *available at* http://blog.al.com/spotnews/2012/10/roy_moore_says_gay_marriage_wi.html.

68. Chief Justice of the Supreme Court Roy S. Moore, Administrative Order of the Chief Justice of the Supreme Court (Feb. 8, 2015). *See also* The Associated Press, Alabama Chief Justice Tells Probate Judges to Refuse Same-Sex Marriage Licenses, National Public Radio (Feb. 9, 2015), *available at* http://www.npr.

9, 2015 only 12 elected probate judges out of 67 counties issued licenses to same-sex couples on the day marriages were ordered to begin.[69]

On February 12, 2015, Judge Granade ordered Mobile County officials to comply with her order. The next day, two-thirds of Alabama's counties reversed course and began issuing licenses to same-sex couples.[70] At its peak, 51 counties across Alabama issued licenses to same-sex couples while the Alabama Supreme Court considered a petition filed by the Alabama Citizens Action Program, the Alabama Policy Institute, and a single probate judge.[71] Beginning the morning after the Alabama Supreme Court issued its decision and as of the filing of this brief, not a single Alabama county is issuing marriage licenses.[72] Couples seeking to apply for a marriage license from the

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org/2015/02/09/384852553/alabama-chief-justice-tells-probate-judges-to-refuse-same-sex-marriage-licenses.

69. Sandhya Somashkhar, Judicial Defiance in Alabama: Same-Sex Marriages Begin, But Most Counties Refuse, The Washington Post (Feb. 9, 2015), *available at* http://www.washingtonpost.com/politics/alabama-judge-stakes-out-defiant-stance-against-same-sex-marriages/2015/02/09/a1be2de4-b06f-11e4-854b-a38d13486ba1_story.html.

70. Sandhya Somashekhar, A Majority of Alabama Counties Are Now Issuing Same-Sex Marriage Licenses, The Washington Post (Feb. 13, 2015), *available at* http://www.washingtonpost.com/news/post-nation/wp/2015/02/13/a-majority-of-alabama-counties-are-now-issuing-same-sex-marriage-licenses/.

71. *Id.*

72. Andrew M. Harris, Alabama Top Court Orders Halt to Marriage Licenses for Gays, Bloomberg Business (Mar. 3, 2015), *available at* http://www.bloomberg.com/news/articles/2015-03-04/alabama-top-court-orders-halt-to-gay-couples-marriage-licenses.

Mobile County Probate Court were met with a sign posting the following message: "The Court and its legal counsel are currently evaluating this opinion and its effect on the Mobile County Probate Court, given recent rulings of the United States District Court for the Southern District of Alabama. Until said analysis is completed, the Court will not issue any marriage license to applicants. We regret having to take this action, but feel that it is necessary given the unprecedented circumstances that exist."[73]

The evolving story of marriage equality in Alabama lays bare the political powerlessness of gay Americans to protect their constitutional rights in the absence of a ruling from this Court. In Alabama, as in other states, a finite resolution of the marriage equality question will end the chaos, not cause it.

B. Religious Exemption Bills

The flood of state religious exemption bills introduced in response to federal court decisions recognizing marriage equality further demonstrates the fierce political resistance to emerging acceptance of gay people. These bills, which would permit the denial of government services and commerce based on religious beliefs that condemn gay people, thwart equal opportunity for gay Americans.

To be clear, Campaign for Southern Equality, which is led by an ordained minister, rejects the political

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73. The Associated Press, Mobile County Will Not Issue Any Marriage Licenses Following Alabama Supreme Court Same-Sex Marriage Order, al.com (Mar. 4, 2015), *available at* http://www.al.com/news/mobile/index.ssf/2015/03/mobile_county_will_not_issue_a.html.

assumption that "religious freedom" is synonymous with a theology that condemns gay people. Religious voices are not univocal on the subject of homosexuality and marriage equality. Growing numbers of faith traditions affirm marriages between same-sex couples, ordain openly gay clergy, and affirm homosexuality as a natural expression of human sexuality.

In fact, representatives of six faith traditions joined a successful lawsuit advocating for the right of same-sex couples to marry and the right of clergy to bless those unions in North Carolina: United Church of Christ, Lutheran, Reform Judaism, Unitarian Universalist, Baptist, and Episcopal. *General Synod of the United Church of Christ v. Reisinger*, No. 3:14-cv-213, 2014 WL 5871742 (W.D.N.C. filed Oct. 10, 2014). It is precisely for this reason that state and local governments should not take a theological position on the issue of marriage equality.

Since this Court's ruling in *United States v. Windsor*, however, 22 states have introduced bills that permit government officials and businesses to deny services to same-sex couples on the basis of a religious exemption:

Arizona,[74] Arkansas,[75] Colorado,[76] Georgia,[77] Hawaii,[78] Idaho,[79] Indiana,[80] Kansas,[81] Kentucky,[82] Maine,[83]

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74. SB1062 would have amended existing law to expand the definition of a person to include corporations and nonprofits. A claimant could seek relief if their religious exercise was "burdened," regardless of whether the government was a party to the case. The bill was vetoed by Governor Brewer after substantial pressure from out-of-state businesses.

75. SB202 would prohibit municipalities from passing nondiscrimination ordinances. The bill passed the Senate and House Judiciary Committee on February 10, 2015, *available at* http://www.arktimes.com/ArkansasBlog/archives/2015/02/10/religious-beliefs-protection-bill-passes-house-judiciary.

76. HB13-1066 died in committee on February 11, 2013.

77. HB29 appears to be currently stalled in committee.

78. HB1624 was rejected by the House Judiciary Committee on February 15, 2014.

79. HB426 died in committee in 2014.

80. SB568 was introduced in 2015.

81. HB2453 would have allowed individuals and organizations to discriminate against married same-sex couples, even though 59% of Kansas voters opposed a bill that would permit businesses to deny service. Public Policy Polling (Feb. 24, 2014), http://www.publicpolicypolling.com/main/2014/02/kansas-voters-oppose-controversial-denial-of-service-bill.html. The bill died in the Senate committee.

82. HB279 passed in 2013 after the legislature overrode Governor Beshear's veto.

83. LB1428 was defeated in the House and Senate in 2014.

Mississippi,[84] Michigan,[85] Missouri,[86] Nevada,[87] North Carolina,[88] Oklahoma,[89] South Dakota,[90] Tennessee,[91] Texas,[92] Utah,[93] West Virginia,[94] and Wyoming.[95]

The North Carolina bill, which passed the state Senate on February 25, 2015, would allow magistrate judges or

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84. SB268 passed on April 4, 2014.

85. SB4 was introduced in 2015.

86. HB104, introduced in 2015, would ban educational institutions from burdening the religious beliefs of students.

87. SB192 passed the Senate on April 22, 2013, but the House did not take it up.

88. SB2 passed the Senate and is awaiting a vote in the House.

89. SB440 was referred to the Judiciary Committee on February 3, 2015.

90. SB128 sought to "protect the citizens and businesses of South Dakota regarding speech pertaining to views on sexual orientation and to provide for the defense of such citizens and businesses." The bill stalled after a committee vote in February 2014.

91. SB1793, the Religious Viewpoints Anti-Discrimination Act, was signed into law on April 10, 2014.

92. SJR10/HFR55 was introduced as a joint resolution in 2015 and replaces "substantial burden" with "any burden."

93. HB332, introduced in 2015, "establishes that a person's lawful exercise of religious liberty under the act is a recognized defense to claims of discrimination . . ."

94. HB4134 died in committee in 2014.

95. HB0083, introduced in 2015, passed the third reading in the house on February 2, 2015.

Register of Deeds who oppose marriage between same-sex couples to opt-out of conducting marriage ceremonies or granting marriage licenses.[96] The bill was introduced after 10 of 672 magistrates statewide resigned or retired rather than perform civil marriage ceremonies following a federal court's ruling on October 10, 2014 recognizing marriage equality.[97] The bill is designed to allow government officials to invoke their religious beliefs in refusing a governmental service to citizens.[98]

These actions come in the wake of two federal courts declaring North Carolina's ban on marriage equality unconstitutional. Yet despite growing public acceptance of federal court rulings recognizing marriage equality, the religious exemption bill demonstrates that the political process still resists the right of same-sex couples to marry.

Notably, in Georgia, former Attorney General Michael Bowers – who vigorously defended Georgia's anti-sodomy law before this Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986) – recently issued a memo opposing Georgia's pending "religious liberty" bill, which he called "an

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96. Philip E. Berger, Senate Bill 2, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=s2.

97. Michael Gryboski, 16 North Carolina Judges Quit Following State Legalization of Gay Marriage, Christian Post, Nov. 22, 2014, *available at* http://www.christianpost.com/news/16-north-carolina-judges-quit-following-states-legalization-of-gay-marriage-130058/.

98. *See* Lynn Bonner, NC Senate Panel OKs Bill Allowing Opt-Out On Marriage Duties, The News & Observer (Feb. 24, 2015), *available at* http://www.newsobserver.com/2015/02/24/4580029_nc-senate-committee-oks-bill-allowing.html?rh=1.

excuse to discriminate" against gays.[99] Stating that he has "changed as society has changed," Mr. Bowers had this to say about religious exemption bills: "This isn't about gay marriage. It's not about religious freedom. It's about the rule of law."[100]

C. Statutes Prohibiting Inclusive Municipal Ordinances

Working with local political allies, gays citizens have, on occasion, succeeded in passing ordinances that provide protections or symbolic support in select cities and counties across the country. Though these ordinances do not provide the level of protection of state and federal law, they represent progress in the march to equality. Recently, a growing number of states have passed laws that prohibit municipalities from enacting ordinances that aim to provide protection to gay and lesbian citizens. These ordinances represent an adverse reaction to recent federal court rulings in support of marriage equality and are reminiscent of the very legislation struck down by this Court in *Romer v. Evans*.

Arkansas' Senate Bill 202, which became law on February 23, 2015, prevents cities and counties from adopting or enforcing an ordinance, resolution, rule, or

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99. Chris Geidner, The Man Who Defended Sodomy Laws Now Believes Everyone Needs Love, BuzzFeed News, Feb. 25, 2015, http://www.buzzfeed.com/chrisgeidner/the-man-who-defended-sodomy-bans-at-the-supreme-court-now-be#.kb3EE0OrE.

100. *Id.* Mr. Bowers' evolution could be the story of our nation's. "[T]his Court's obligation is to define the liberty of all, not to mandate its own moral code." *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

policy "that creates a protected classification or prohibits discrimination on a basis not contained in state law" as it applies to private entities.[101] The law is a direct response to cities like Fayetteville, Arkansas, which passed a measure in 1998 that provided protection from employment discrimination to gay city employees.[102] Shortly thereafter, an anti-gay advocacy group opposed the resolution and brought the matter to a public vote. Voters repealed it at the ballot.

Sixteen years later, in August 2014, the Fayetteville city council passed an ordinance that prohibited discrimination against gay people in employment and housing. In a December 2014 special election, voters narrowly repealed this measure. Shortly thereafter, State Senator Bart Hester, who supported the repeal of the Fayetteville ordinance, introduced SB202, explaining that "he found it 'infuriating' that officials in [Fayetteville] had repeatedly attempted to expand civil rights laws for [gay] people."[103]

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101. SB202, http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=SB202. *See also* Jeff Guo, *That Anti-Gay Bill In Arkansas Actually Became Law Today. Why Couldn't Activists Stop It?*, The Washington Post (Feb. 23, 2015), *available at* http://www.washingtonpost.com/blogs/govbeat/wp/2015/02/23/that-anti-gay-bill-in-arkansas-actually-became-law-today-why-couldnt-activists-stop-it/.

102. Memo, Williams Institute, Arkansas – Sexual Orientation and Gender Identity Law and Documentation of Discrimination (Sept. 2009).

103. *See* http://www.buzzfeed.com/dominicholden/arkansas-legislature-expected-to-pass-law-allowing-lgbt-disc#.mgyaL3809y and http://www.fayettevilleflyer.com/2014/12/09/voters-repeal-civil-rights-ordinance-in-fayetteville/.

The abuse of political power to roll back modest civil rights advances is also on display at the local level. Starkville, Mississippi, home of Mississippi State University, became the first Mississippi city to extend benefits to domestic partners by a unanimous 7-0 vote in September 2014, on the heels of becoming the first city to pass a resolution welcoming gay people and their families to the city.[104] After pressure from religious leaders "to move the policies and positions for this city back to a Judeo-Christian position," the Starkville aldermen repealed both the anti-discrimination statement and the domestic partner benefits policy in a closed-door session.[105]

These examples demonstrate that the political process cannot reliably or predictably protect the rights of gay and lesbian Americans.

III. OTHER CIRCUITS HAVE RECOGNIZED THAT THE COURTS MUST INTERVENE IN THIS POLITICAL ENVIRONMENT

In *Lawrence*, this Court flatly rejected the idea that a majority's moral disapproval could justify the deprivation of rights for a minority class, stating that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason

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104. WTVA, Starkville Extends Partner Benefits to LGBT Community (Sept. 5, 2014), http://www.wtva.com/news/local/story/Starkville-extends-partner-benefits-to-LGBT/r9unvAzhpUe6zze668U7aw.cspx.

105. Laura Conaway, Mississippi Town Repeals Anti-Discrimination Resolution in Secret, MSNBC (Jan. 8, 2015), http://www.msnbc.com/rachel-maddow-show/mississippi-town-repeals-anti-discrimination-resolution-secret.

for upholding a law prohibiting the practice." *Lawrence v. Texas*, 539 U.S. at 560, 577-78 (noting that in *Loving* "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

The decision of the Sixth Circuit in *DeBoer* stands *Lawrence* and the Constitution on its head by asserting that state legislative majorities should be allowed to dictate the rights of minorities, ignoring that the Bill of Rights, as incorporated in the Fourteenth Amendment, was enacted precisely to protect the rights of minorities and individuals from legislative majorities.

As this Court so eloquently stated:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principals to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom to worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). *See also Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."). The reasoning of the majority in *DeBoer* ignores this basic principle and

harkens back instead to the "popular sovereignty" debates over slavery that preceded the Civil War and passage of the Fourteenth Amendment.

Unsurprisingly, other courts have taken the exact opposite view as *DeBoer* in declaring the need for judicial intervention *because* of the lack of political power to protect constitutional rights.

In *Bostic v. Schaefer*, 760 F.3d 352, 379-80 (4th Cir. 2014), for example, the Fourth Circuit expressly rejected the notion embraced by the Sixth Circuit:

> Americans' ability to speak with their votes is essential to our democracy. But the people's will is not an independent compelling interest that warrants depriving same-sex couples of their fundamental right to marry. . . . . Accordingly, neither Virginia's federalism-based interest in defining marriage nor our respect for the democratic process that codified that definition can excuse the Virginia Marriage Law's infringement of the right to marry.

The Tenth Circuit similarly applied this Court's teaching in rejecting the "wait and see" deferral to state legislatures argument:

> Plaintiffs in this case have convinced us that Amendment 3 violates their fundamental right to marry and to have their marriages recognized. We may not deny them relief based on a mere preference that their arguments be settled elsewhere. Nor may we defer to

> majority will in dealing with matters so central to personal autonomy. The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box.

Kitchen v. Herbert, 755 F.3d 1193, 1228 (10th Cir. 2014); *accord Latta v. Otter*, 771 F.3d 456, 474 (9th Cir. 2014) (rejecting democratic federalism argument because "a primary purpose of the Constitution is to protect minorities from oppression by majorities").

As the Fourth and Tenth Circuit have recognized, the Sixth Circuit's "wait and see" approach only delays the constitutionally mandated recognition of equal rights for the gay community. Because gay Americans constitute a discrete, insular minority that are politically powerless to protect their constitutional rights through the legislative process, it is in the province of the judiciary alone to act as a bastion. As Judge Posner, writing for the Seventh Circuit beautifully articulated: "Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin v. Bogan*, 766 F.3d 648, 671 (2014).[106]

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106. *See also Waters v. Ricketts*, No. 8:14CV356, 2015 WL 852603, at *3 (D. Neb. Mar. 2, 2015); *Campaign for Southern Equality v. Bryant*, No. 3:14-cv-818-CWR-LRA, 2014 WL 6680570, at *41 n. 8 (S.D. Miss. Nov. 25, 2014); *In re Adoption of J.S.*, No. 20120751, 2014 WL 5573353, at *21 (Utah Nov. 4, 2014); *Hamby v. Parnell*, Case No. 3:14-cv-00089-TMB, 2014 WL 5089399, at *10 (D. Alaska Oct. 12, 2014).

CONCLUSION

Accordingly, and for the reasons articulated in this brief, this Court should exercise its Constitutional mandate to protect the fundamental right to marry that belongs to all Americans.

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